

# Consumer Finance Monitor (Season 5, Episode 46): Two Federal Courts Deal Blow to Biden Administration's Federal Student Loan Forgiveness Program: A Close Look at the Decisions

Speakers: Alan Kaplinsky and Thomas Burke

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, former practice group leader for 25 years and now Senior Council of the Consumer Financial Services Group at Ballard Spahr. I'm very pleased to be moderating today's program. For those of you who want even more information, don't forget about our blog, [consumerfinancemonitor.com](http://consumerfinancemonitor.com).

It goes by the same name as our podcast show. We've hosted the blog since 2011, so there's a lot relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. To subscribe to our blog or to get on the list for our webinars, please visit us at [BallardSpahr.com](http://BallardSpahr.com). If you like our podcast, let us know about it. Leave us a review on Apple Podcast, Google, or whatever platform you may use to access your podcast. Also, please let us know if you have ideas for other topics that we might consider for our podcast show and if you have ideas on who we should invite to be guests on our show.

Today, we're going to be talking about a very timely issue. I will provide just a brief overview, and then I'm going to introduce our guest for today, who happens to be my colleague, Tom Burke. And then I have a lot of questions for Tom. If you roll back the clock to the early stages of the pandemic, there was legislation that got enacted, and the legislation very wisely at that time placed a moratorium on payments that had to be made on federal student loans. That moratorium had an expiration date, it expired, and then presidents Trump and then Biden have extended this moratorium now so that it expires at the end of this year.

But there had been a lot of pressure on President Biden to not just postpone the date when payments needed to be made on the federal student loan debt, but also to forgive some of that debt. In some instances, people were clamoring that all the debt should be released. Well, it's not exactly what he did, although he did something very significant I guess it's a couple of months ago now, maybe a little bit longer. Tom will certainly tell us the precise state. He forgave a big chunk of the federal student loan debt for certain qualified borrowers. With that, there had been a lot of talk about there being challenges to what President Biden and the Secretary of Education had done.

On June 2nd, I had Tom on our show and he prognosticated what he thought was going to happen. I guess what we've established today in the last week or so is that Tom is a very good soothsayer. Yes, he was spot on in indicating at that time what he thought would ultimately happen here. Without further ado, let me introduce you to Tom. He's a partner in Ballard Spahr's Philadelphia office where he's a member of both the Consumer Financial Services Group and the White Collar Group. He litigates student lending matters across the country on behalf of lenders, guarantors, and loan servicers.

He's represented clients in major enforcement actions, class actions, other prominent student loan litigation, and he regularly advises clients on related regulatory issues and state licensing issues. Tom, once again, a very warm welcome to our podcast show.

Thomas Burke:

Thank you very much, Alan. I'm excited to be here.

Alan Kaplinsky:

Okay, well, we have got a lot to talk about. A lot has transpired since June 2nd. But for those listeners today who may not have listened to your June 2nd podcast, or may in fact not have been following this developing story, maybe you could give our listeners a brief overview, a little more detail than I gave, on how the story began and bring us up to the point of the litigation being filed. And then we're going to talk about two very important opinions that have been rendered.

Thomas Burke:

Absolutely. Thanks, Alan. All of this kicked off, as you noted, back in early 2020 when Congress authorized a payment pause and a 0% interest rate on federal student loans for the duration of the early portion of the pandemic. After Congress's authorization for those things had expired, the Trump administration also followed suit by through executive action extending that payment pause. The Biden administration has done that now several times as well, such that if you're a federal student borrower, you have not made payments on your loans going on three years.

Over the course of that pause, certain elements of the administration became more and more interested in a proposal that Elizabeth Warren had been advocating for and that President Biden initially said he thought he could not do, which was to forgive through executive action only a large portion of the outstanding federal student loan debt. The clock was ticking on that for about two years. And finally, in August of this year, we got some indication that the Biden administration was actually going to do it.

They were going to forgive approximately \$10,000 per student loan borrower who met certain income caps, that would be \$20,000 if you had received a Pell Grant, which is also an indicator of financial need, and that they wanted to do it fast. They wanted to do as much of it automatically as they could for tens of millions of borrowers with no submission of any kind from those individuals. For others, they wanted to require just a very limited certification as to income. They fired up that mechanism. They began soliciting applications from borrowers and they said, "You know what?" We're going to go ahead with this before election day."

Almost immediately a number of legal challenges came out of the woodwork to that proposed action, various kinds, various success rates. And now we sit here today with two that have abruptly resulted in court decisions that have paused the administration's ability to proceed with that action.

Alan Kaplinsky:

Thanks, Tom. Let's talk about the first development that occurred in litigation that had been brought in a federal court in Texas.

Thomas Burke:

Sure. This is probably the fourth or fifth action that was filed, and it involved two plaintiffs who said that they were deprived of an opportunity under the Administrative Procedure Act to review and comment on that federal initiative during the time when it was under deliberation by the US Department of Education. As you and I know, a lot of administrative action, certainly the norm is that it has to undergo what we call the notice and comment period, which is where it gets published, various stakeholders get to weigh in on what's good about it, what's bad about it, how it should be changed.

The allegation here was that that didn't happen. And that as a result for those two plaintiffs, they either did not get loan forgiveness, or they did not get as much as they otherwise would've gotten if they had been able to try to influence those deliberations. That case was moving slowly. Not a lot happened. As in many of these cases, the plaintiff moved for a preliminary injunction that would stop the administration from taking any action until it had reached a decision on the merits of the claim and the government opposed that on the grounds that the plaintiffs lacked standing to challenge that action.

They said, "Hey, we're taking this action under the HEROES Act of 2003." I'll talk more about what the HEROES Act is and what it requires, but one of its most salient features is that it is exempt from notice and comment obligations that most administrative actions do need to follow. The tension there was whether these plaintiffs would be found to have standing, and then in turn whether their merits challenge as to whether the administration had the authority under the HEROES Act would hold up.

Alan Kaplinsky:

Let's focus on the two things that you mentioned, Tom. First of all, standing and then we'll get to the merits. These two plaintiffs under the qualification rules that have been set forth by the administration, they were upset, I take it, that they didn't qualify or they thought they wouldn't qualify and they were trying to derail the entire program because it didn't include them. Is that what happened here?

Thomas Burke:

That is certainly one characterization of it. A number of commentators have suggested that this approach is everybody else is getting nice things, I'm not getting them, so therefore nobody should get them.

Alan Kaplinsky:

Misery loves company, right?

Thomas Burke:

Yes.

Alan Kaplinsky:

Isn't that what it's all about?

Thomas Burke:

There's certainly a view that these plaintiff individuals were spoiling a good thing for everybody else because they were not included in it. Now, their challenge is not unique in legal history. Certainly there have been other cases where individuals have challenged what they view as the unfair distribution of benefits. In this case in particular, the allegation was that one individual had commercial loans which fell outside the scope of the initiative and that the other individual did not receive a Pell Grant. They would be getting only \$10,000 instead of \$20,000. Those are the terms that the court reviewed this under.

And more broadly, their harm was a procedural harm, which is that they did not get to engage in this notice and comment period that they think might have moved the needle either way to say, "We may have a lot of borrowers who are similarly situated to us. And if we stand up and advocate for ourselves, maybe the administration will do more, or maybe they'll revise it." They're saying, "We don't know because that didn't happen here."

Alan Kaplinsky:

And that was basically how they dealt with standing, right? Is there any other nuance to the standing holding before we get to the merits?

Thomas Burke:

The nuance to it came more from the court's ruling on it than from the plaintiff's position in my view. The court kind of commingled the merits and standing inquiry by saying, "You're right. The HEROES Act does not require notice. You, the administration, are right. The HEROES Act does not require notice and comment. The deprivation of that in this instance would not normally be a basis for standing." However, if the administration did not have the authority to take this action under the HEROES Act, meaning if plaintiffs are right on the merits, then in turn there would've been no exemption from notice and comment for this proposed action.

The administration would've had no authority to do this at all, notice and comment or otherwise, if plaintiffs are right. Therefore, we have to entertain the possibility that they were wrongly deprived of notice and comment. There are some who may call that circular or bootstrapping, and there are some who will probably look at it and say, "You know what? That's the right way to look at it." I think we'll find that out as we get more appellate judges who take a look at this rule.

Alan Kaplinsky:

Let's talk about the HEROES Act. I thought the HEROES Act pertained to members of the military. What the heck that does that have to do with student loan forgiveness?

Thomas Burke:

Sure. That's a great question. The act was passed certainly with a focus on military members, at least in terms of the need for it. This was a post 9/11 bill that essentially authorized the Department of Education to take action and response to national emergencies or to war time actions to ensure that people affected by those things would not end up worse off financially as a result of the emergency. When you look at the preamble, when you look at the floor debate on this act, there was a military focus. Textually, there is no firm requirement that it be related to just military borrowers.

Alan Kaplinsky:

What is the exact language, the relevant language that the court hung its hat on in that stat?

Thomas Burke:

Well, it's more a question of what language the administration tried to hang its hat on, and the administration tried to say that at least... Because the point I'm about to make is the court found that there was no language to hang your hat on for the administration's purposes. The administration said, "We have broad power to take emergency action in response to something like the pandemic to make sure that people are not put in a worse position because of the impact of the pandemic on their financial circumstances." Therefore, targeting a loan forgiveness program to mostly low income borrowers is a reasonable way of ensuring that those folks don't come out of the pandemic worse off than they started.

The court pushed back on that in three ways. First, the HEROES Act doesn't say anything about loan forgiveness. It says that the secretary has the ability to modify or waive various provisions of the Higher Education Act. It doesn't say forgive loans. It doesn't say cancel principle balances or anything to that effect. The court found it a stretch in terms of the plain language of the statute. Second, the court looked at all of the individual subsections the administration was pointing to and it said those do not provide clear authorization either. I'm going to come back to that in a second.

And then third, the court said the Department of Education has never used the HEROES Act in a way that approaches anything like this in 20 years. It's never forgiven a whole big swath of loans. We should view with skepticism any action that discovers some unheralded power in a nook or cranny of a statute long after it's been enacted.

Alan Kaplinsky:

It sounds a little like the fairly recent Supreme Court opinion in the State of West Virginia versus Environmental Protection Agency where the court ruled that the language in one of the environmental protection statutes was not sufficiently precise enough to cover what EPA had done, a regulation that the EPA issued, throughout the EPA regulation. I can't remember if there's a name for that doctrine that the Supreme Court gave it. Did the District Court rely at all on that recent Supreme Court opinion?

Thomas Burke:

Yes, that's exactly right. This is something that we probably could not have predicted on our last discussion on this topic back in May and early June because that decision came down at the end of June. It was West Virginia v. EPA and a conservative majority of the Supreme Court held that the Major Questions Doctrine, which is something that lower courts had talked about for years and the Supreme Court had, in their view, used without naming it as such, and many other holdings.

The thesis there is that where the administrative agency takes action on a question of great political or economic significance, then you have to be able to point to clear congressional authorization as opposed to historically under the Chevron analysis, the agency would get a measure of deference as to its own interpretation of statutory language. The court is basically saying no deference here when you're talking about major questions. The Texas Court, unsurprisingly I think, because many

commentators as soon as they saw this West Virginia opinion knew that this loan forgiveness situation was going to be a case in point for it if ever there was one.

The Texas Court said, "Well, of course this, is a question of major economic significance. We're talking about \$400 billion in loan forgiveness. It's also a question of great political significance, because members of Congress on both sides have advanced bills that have tried to impact this one way or another and they've generally failed." We know that members of Congress are talking about it. We know that Nancy Pelosi in fact said that she did not think President Biden had the authority to do that.

By the way, when you have the Speaker of the House from your own party saying that you don't have the authority to do something in the executive branch, I think you can tell that obviously there's a great tension there.

Alan Kaplinsky:

I'm curious, Tom, in the briefing that was done by the plaintiffs in the case, did they throw back any of that in what Nancy Pelosi had said and also Biden, what he had said earlier?

Thomas Burke:

Not just in the briefing, but the court cited those things in its opinion. It's not a dry opinion. Obviously judges have different affiliations. This judge happened to be affiliated with the Federalist Society and he cites The Federalist Papers. He drops a footnote on page one that says judges should be mere machines not driven by compassion or mercy. And that whether this law forgiveness is sound policy or not is not the question for the court to decide, it's whether it is authorized under the separation of powers. You have a lot of rhetoric here that you've heard from certain other areas if you read a lot of judicial opinions.

Alan Kaplinsky:

Interesting that the opinion came down after the midterms, not before.

Thomas Burke:

That's correct.

Alan Kaplinsky:

Coincidence, Tom?

Thomas Burke:

In this case, I'm not sure. This is a 26 page opinion. It's long. Somebody spent a lot of time on it. Could it have come down in time to be a November surprise? Maybe. But I think this court and as we'll talk about the Eighth Circuit in a moment, were probably a little bit apprehensive about dropping a major development on the eve of the election. Yes, I think there may have been a tasteful decision to hold off until afterward.

Alan Kaplinsky:

Right. Now, before we turn to the second opinion, which I'd like to get on the table, maybe if you could once again... Because this is a little bit tricky. I know I had difficulty when I read the opinion, and then ought to make sure everybody is aware of the terrific blog article that you wrote literally the day after the... Was it the day of the opinion or the day after the opinion came down?

Thomas Burke:

I think we were up late writing it and it was published the next morning.

Alan Kaplinsky:

Yeah, right, right, in [consumerfinance.monitor.com](http://consumerfinance.monitor.com). But the court here uses part of its merits opinion in order to bootstrap or predicate its holding on standing, if I got that right. Why don't you just carefully run through that again so that our listeners understand it?

Thomas Burke:

Sure. To be clear, I'm not suggesting that the opinion should be reversed on that basis or that necessarily is bootstrapping. It is certainly a thoughtful opinion. Some might call it a clever opinion. It concludes that if the administration did not have the authority under the HEROES Act to take this action, then it may have tried to do it under the Higher Education Act itself or some other way, but certainly in some other way that would have required notice and comment. Where plaintiff is ultimately saying that the administration did not have the authority to do this, then at the standing analysis, you have to credit that view and see what the repercussions of it are if it's correct.

The court basically found that if plaintiff is correct on the merits, then they have standing. Others may defend it differently, but certainly it's enough to be of interest for an appellate court to take a look at and think about. I think that this opinion likely will be upheld by the Fifth Circuit. I think it likely will go to and will be upheld by the Supreme Court, including the standing.

Alan Kaplinsky:

Sure. Well, yeah, all right. Before we get to that Eighth Circuit opinion, I'm going to change my mind and let's focus on next steps. After the opinion came down, what was the next thing that happened?

Thomas Burke:

Sure. The administration I think the same day appealed to the Fifth Circuit Court of Appeals to get that in front of a panel of Fifth Circuit judges. The Fifth Circuit I believe has not yet acted on that appeal there. They're certainly not going to stay implementation of it because there would be nothing to stay. The district court vacated the administration's action. Unless the district court is reversed allowing the administration to proceed, then for now it's on pause. The loan forgiveness program is on pause.

Alan Kaplinsky:

They didn't file any papers to try to expedite the appeal in the Fifth Circuit?

Thomas Burke:

They did. They did urge expedited consideration of the issue. Whether that means that you get to an immediate en banc hearing, I'm not sure. It's possible. This is certainly a major issue. In other words, to avoid the need for a three judge merits panel to hear the case and then an en banc panel to hear it afterward, they may do it all in one step, which would be to just have an immediate en banc hearing after appropriate briefing, of course.

Alan Kaplinsky:

The Fifth Circuit is dominated by Republicans, several of whom were appointed by President Trump. It's known as being a conservative Court of Appeals, perhaps the most conservative in the country, at least I think that it is. I'm very familiar with the composition of the court because it's the same court that very not long ago concluded that the CFPB was constitutionally funded. We're waiting now to see what the government or the CFPB is going to do in that case. Are they going to file a petition for rehearing en banc, or are they instead going to file a sur/petition with the Supreme Court?

When I looked at the composition of the judges, I think there are 17 active judges, 16 or 17. There are only four Democrats on that entire court. Biden has nominated one other judge to be on the court, but that hasn't been confirmed as yet. I'm not sure exactly what the timing is on that. It's going to go to the Fifth Circuit. I take it there's a procedure to skip the three judge

panel and go directly to an en banc hearing before the entire court. That is something that can be done in an appropriate case. Not often.

Thomas Burke:

That's right. You can try it. It's rarely granted. This is a mega case of sorts. There is arguably sometimes sensitivity to it. It's possible they'll entertain that. On the other hand, for the reason you just noted, Alan, the administration may think that they have a better shot of getting a lucky draw with a few of those Democratic appointed judges on a small panel rather than going immediately to en banc where their chances for the reasons you just described are maybe not as good.

Now, I'll note, it's probably not a coincidence that this case was filed in Texas. Certainly the challengers could not have hoped for a more favorable district court judge in terms of ideology. The Fifth Circuit likewise is where they would want their appeal to be if they could choose.

Alan Kaplinsky:

Yeah, sure. Of course, after they go through that process, depending upon the outcome, one would expect that if they lose in the Fifth Circuit, the government will try to get US Supreme Court review. But there, they're facing another difficult situation ideologically because you've got six conservative judges and three liberal judges. The numbers don't work out so well. I think the key issue that they're all going to grapple with more than the merits is probably going to be the standing issue again. If that argument holds up that it was relied upon by the district court, then I would say it looks like President Biden's plan is going down.

Thomas Burke:

Let me note on that, Alan. There's an interesting tension there between the fact that historically you typically see progressive judges advancing in a less restrictive version of standing doctrine because they favor some greater access to the courts, whereas arguably conservative justices have advanced a more restrictive version of federal standing. Here, that's a little bit flip flopped, because for a more conservative panel to reach that merits question where they feel very strongly about the separation of powers argument, they may have to take some medicine on standing and countenance expansion of doctrine in that area.

The district court did that and we'll see what happens if it reaches the Supreme Court. But certainly on the merits, I think a lot of the commentators have concluded that that's a much easier question for the plaintiffs than standing.

Alan Kaplinsky:

I take it that the government could have relied on the Higher Education Act, but elected not to. Am I right?

Thomas Burke:

It could have tried to for one thing that would've indisputably required notice and comment, which would've slowed things down. For another, as I and many other people have said, I think the textual argument there is very thin, thinner than under the HEROES Act. We saw the Office of General Counsel for the previous Department of Education conclude that the secretary lacked that authority under the Higher Education Act. I don't think there's any reason to think they would've been more successful if they had taken that approach.

Alan Kaplinsky:

Let's talk about the Eighth Circuit case. I mean, I don't know how many cases, lawsuits actually got filed, but there were a bunch of them, right?

Thomas Burke:

There were five or six at least, and most of those pattered out pretty quickly. The first was a prose case filed by a person who's standing argument was essentially that they were a taxpayer and that they had a mortgage rate that they thought would go up if

the administration started spending all this money. The courts didn't think very much of that. There was another fairly creative challenge that the department actually changed the program in response to the challenge and mooted it. They carved out the conduct that that was the subject of that complaint.

The biggest challenge or certainly the one that most people expected to be a serious challenge was brought on behalf of a group of six attorneys general for various states, including Missouri, and that was eventually filed in federal court in Missouri.

Alan Kaplinsky:

There were six attorneys general involved in that?

Thomas Burke:

That's correct.

Alan Kaplinsky:

What state, Tom? Missouri certainly, but what other ones?

Thomas Burke:

Sure. It was Nebraska, Arkansas, Iowa, Kansas, and South Carolina. All jurisdictions where you would not necessarily be surprised to see the attorneys general on board with the challenge to federal administrative action under a Democratic administration.

Alan Kaplinsky:

What happened in the district court in that case?

Thomas Burke:

In the district court, in a thoughtful analysis by a George W. Bush appointee, the court concluded that the plaintiffs did not have standing. The states had advanced a number of potential bases for standing, which I won't get into in great detail. But the State of Missouri in particular said that they have a student loan servicer that is itself an arm of the government, an instrumentality of the State of Missouri, in that it is a quasi-governmental entity and it sends some of the money that it makes through its loan servicing activities back to the State of Missouri and so forth.

And that that entity would be harmed because of the administration's actions in so far as its loan servicing volume would go down substantially if the loan forgiveness plan went through as anticipated. They said ultimately that's going to hit the coffers of the State of Missouri, and they believe they have standing on that basis. The district court did not agree with that conclusion. It found that the loan servicer was not sufficiently connected to the state that the attorney general could bring a claim on its behalf. It said, "Listen, things might be a little different if that entity itself was the plaintiff, but it's not."

It found that the state AGs lacked standing. It did not reach the merits question. It specifically said that it thought the case presented weighty issues of significant societal importance, but that there's no basis on which to reach them.

Alan Kaplinsky:

Did it come up in the context of a motion to dismiss or had the plaintiffs made a motion for a preliminary injunction?

Thomas Burke:

The plaintiffs moved for a preliminary injunction. I believe the administration cross filed for dismissal for lack of jurisdiction. On that basis, the district court denied the motion for the preliminary injunction and dismissed the case for lack of jurisdiction based on lack of standing.



Alan Kaplinsky:

And then that case, it went up on appeal to the Eighth Circuit Court of Appeals and got assigned to a three judge panel. And they came down with an opinion today, right?

Thomas Burke:

That's right. One thing happened before that, which is that immediately after the case went up on appeal, the court clerk entered an administrative stay granting a stay pending a three judge merits panel looking at whether to grant a longer stay during the duration of the appeal. In other words, the clerk's office granted kind of a mini stay until judges could look at it, and that alone was enough to stop the Biden administration from being able to move forward with this plan before election day.

The administrative stay blocked the ability to proceed with loan forgiveness for a matter of weeks, and now finally, today, as of a couple hours ago, we do have a ruling from the Eighth Circuit on the motion for a preliminary injunction pending appeal.

Alan Kaplinsky:

What did the court do?

Thomas Burke:

Well, the court came down with an analysis that was a little bit more moderately worded, but ultimately very similar to the one that we saw in Texas, which is it concluded that the State Attorney General of Missouri had standing to challenge the administration's ability to engage in loan forgiveness, and it essentially reversed on the question of whether this state loan servicer was sufficiently connected to the State of Missouri for purpose of standing.

It's fairly fact specific, but the court concluded that it very potentially was an arm of the State of Missouri for purposes of standing such that the AG could bring a suit on its behalf. In any event, even if it's not, they said, "Listen, there's a good chance this is going to hit Missouri in the pocketbook for the reasons we just discussed, and that also is enough."

Alan Kaplinsky:

It reached only the standing issue. That was the only issue that had been dealt with by the district court, right? The district court never got to the merits.

Thomas Burke:

That's correct. Although for purposes of granting a stay pending appeal, you have to meet the same fairly high threshold of a stay at the district court level, and that includes an analysis of which way the equities balance, so to speak, and the probability of success on the merits. The Eighth Circuit found that the equities strongly favored an injunction. Because if the secretary went ahead with loan forgiveness, it would be irreparable in the sense that it's very hard to unwind all of those loans cancellations if they happened.

Comparatively, holding it up for a few weeks or months while courts could look at it, would be the more equitable thing to do. And then although the court noted the fact that it typically does look at the probability of success in the merits, they cited that factor, but they didn't analyze it. In other words, there was no language here on the merits about the HEROES Act, which was a little bit surprising to me.

Alan Kaplinsky:

They only dealt with standing as to the Missouri AG. What about the other five attorneys general? They got a free ride here?

Thomas Burke:

They do get a free ride. The conclusion is that at least for purposes of moving forward with the appeal, they only needed to show that at least one plaintiff would have standing to challenge it. The administration had said, "You have AGs from six

states here. So at most, you should freeze the program only as to the residents of those six states. The other 44 states that are not challenging it, you should let us go ahead and forgive those loans." The court here said it doesn't work that way.

The loan servicer in Missouri, that is the most significant piece of this challenge, services loans for residents all across the country because of how intertwined it is in that federal portfolio. Allowing forgiveness to proceed as to borrowers in, for instance, Texas would nonetheless have an impact on Missouri. There's no way. We're not going to try to redline it and limit it to just certain jurisdictions. We're going to pause the whole thing.

Alan Kaplinsky:

Now, what options does the government have at this point? I take it they could go back to the district court and continue to litigate the merits, or they could seek, file a petition for rehearing en banc in the Eighth Circuit. Am I right?

Thomas Burke:

They don't have any good options right now other than playing it out in front of, A, the Fifth Circuit, and B, the Eighth Circuit. The challenge for them is that before they come...

Alan Kaplinsky:

I'm talking about the Eighth Circuit now. The government has got to decide what are they going to do in that case, that particular case.

Thomas Burke:

Right. The plaintiff in that case, that case is the flip flop of the Texas case, insofar as the district court opinion there favors the government. The government can't really go back to the district court at this point. It's already up on appeal, the plaintiff's appeal. The plaintiff got what they wanted, which is the interim stay pending appeal. I don't believe there's a mechanism for them to try to get an en banc review of that decision at this time. In other words, I think they have to move forward on the merits. They can try to do it quickly, which the court may or may not entertain, but they're eventually going to have to persuade the Eighth Circuit on the merits to affirm the district court's decision on standing.

Alan Kaplinsky:

But in the meantime, that case seems to me quite a bit further behind the case in Texas.

Thomas Burke:

It is further because of a fairly unusual procedural mechanism the Texas judge used, which was when faced with the same circumstance as the Missouri judge, it utilized Rule 65 of the federal rules of civil procedure, which allows the court to convert a motion for a preliminary injunction into a motion for summary judgment, which means that instead of issuing an opinion only on a preliminary injunction, it says the record is complete. Nobody needs to enter any more facts. I have everything I need to decide the whole case right now.

The court said that circumstance is present here, and it then entered a final judgment in favor of the plaintiffs on I think cumulatively less than 30 days time from filing, which is close to a speed record if it's not the record. That final judgment is now what is being appealed to the Fifth Circuit. You're correct. That case is procedurally farther along.

Alan Kaplinsky:

Right. What was the reaction from the Biden administration in connection with what the federal district court did in Texas?

Thomas Burke:

Sure. It's been as you've expected. They've said that they think the ruling is wrong. They think that the administration has the authority to move forward with loan cancellation. They are not going to move forward with loan cancellation while the district

court ruling prevents them from doing so is my understanding. But they can take other actions. Specifically, a lot of people are wondering what's going to happen now with respect to that January 1st resumption of payments because that can have been kicked down the road I think almost 10 times.

Many of those times, not everyone, but many of those times the department has said, "This is it. It's the last one. We're not going to be doing that again." They've said at this time around. Not that that has ended up binding in the past, but it creates a whiplash scenario for borrowers. Because imagine that you're somebody who's contemplating what they're going to do about their loans and they're being told it's paused, the pause is over, it's paused again, and the pause is over. They're being forgiven, so they'll be gone permanently. The forgiveness is canceled, the forgiveness is on appeal. How do you know what to do?

Alan Kaplinsky:

Do you have any idea, Tom, what are we talking? The Biden administration wants to move ahead with cancellation of \$400 billion. What is the entire universe of loans that we're talking about? Is it in the trillions?

Thomas Burke:

Yes. Last time I checked it was about \$1.7 trillion. This would be something like 25% of the total portfolio. But just in terms of the payment pause, it's notable that every month of the payment pause is also something like \$10 billion in foregone interest. Although we're talking about the payment pause being a relatively small thing, it's still a fairly consequential decision.

Alan Kaplinsky:

Why hasn't anybody challenge that? I mean, is there better authority for the administration to impose moratorium and then keep extending it month after month? Is that hanging on a stronger reed than the loan forgiveness itself?

Thomas Burke:

It's a little bit stronger, but all of this is uncharted waters in some sense. Here, at least with respect to the payment pause, you did have it initially authorized by Congress. You had a bipartisan set of administrations extend it several times, meaning that everybody was doing it. Further, there seems to be a bit of a conceptual dividing line between foregoing interest and suspending repayment versus forgiving debt. That further kicker of can they forgive the debt is one that is of a lot of interest under the text of the statute.

Alan Kaplinsky:

Anything that we failed to cover today, Tom, that you think is germane to this ongoing story that you've told today?

Thomas Burke:

I think we will all be watching closely as it makes its way up on the merits to the Fifth Circuit and the Eighth Circuit. The strong assumption is that it will reach the Supreme Court, where, as you noted, we have that conservative majority right now. They have this new tool in a sense, the Major Questions Doctrine, that was just, as the Texas Court put it, just crystallized in *West Virginia v. EPA*.

I think there's a very good chance that we will see that doctrine exercised in a way that even for people who are interested in this stuff, apart from the student loan space, if you are watching, how big will the administrative state get, what can the administration do with or without congressional action, this is going to be a real case in point for maybe the high water mark of executive action on some of these issues.

Alan Kaplinsky:

I forgot one other thing. Did Elizabeth Warren have a reaction to all this? She must have, right?

Thomas Burke:

I didn't look. I think we can infer that it's probably frustration. She probably released a press release that I should go track down.

Alan Kaplinsky:

I'm wondering if she attacked the judges. She wasn't at all pleased with the result of the Fifth Circuit opinion involving the CFPB. Of course, that was her brain child, but she let her feelings be known.

Thomas Burke:

Well, let me just note, this in a sense is as well, because it was her presidential platform that most strongly advocated for forgiveness at a time when President Biden was saying he didn't think he could do it. The law forgiveness effort that got to where it was, you can trace that back to Elizabeth Warren as well.

Alan Kaplinsky:

Stay tuned I guess is the message. I'm looking forward, Tom, after there are further developments in this story that we'll have you back as the guest again on our show because this is by no means the end of the book. There is going to be quite a bit more that will go on in this case. My guess is the story will not end by the end of this year. This is going to go into next year.

Well, anyway, I want to thank you very much for taking your time today to bring us up to speed on this really important issue and sharing it with all of our listeners. To make sure you don't miss our future episodes, make sure that you subscribe to our show on your favorite podcast platform, be it Apple Podcast, Google, Spotify, or wherever you get your podcasts. Don't forget to check our blog, [consumerfinancemonitor.com](http://consumerfinancemonitor.com), for daily insights on the consumer financial services industry.

We have been blogging about this student loan forgiveness saga for quite some time. If you go on our blog, you can see what we've written already. We've written about the Fifth Circuit case. I'm pretty sure, Tom, you'll be doing something on that Eighth Circuit opinion, right?

Thomas Burke:

There's a very good chance.

Alan Kaplinsky:

Okay. If you have any questions or suggestions for our show, please email [podcast](mailto:podcast@ballardspahr.com), that's singular, [podcast@ballardspahr.com](mailto:podcast@ballardspahr.com). Stay tuned each Thursday for a new episode of our show. I want to thank all of our listeners today and wish everybody a very good day.